

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PENNSYLVANIA AVENUE FUNDS,

Plaintiff,

v.

EDWARD J. BOREY, et al.,

Defendants.

CASE NO. C06-1737RAJ

ORDER

I. INTRODUCTION

This matter comes before the court on three motions (Dkt. ## 119, 121, 122) to dismiss Plaintiff's second amended complaint ("Second Complaint"). Although the parties have requested oral argument, the court has already heard lengthy oral argument in resolving Defendants' motions to dismiss Plaintiff's first amended complaint ("First Complaint"), and finds that further oral argument would not be helpful. The court resolves these motions based on the parties' briefing, the Second Complaint, and documents subject to judicial notice. For the reasons stated herein, the court GRANTS all three motions to dismiss, and dismisses this action with prejudice and without leave to amend. The clerk shall not enter judgment at this time, as the court will address Plaintiff's response to the court's September 23, 2008 order to show cause in a separate order.

II. BACKGROUND

The parties should read this order in conjunction with the court’s three February 2008 orders dismissing Plaintiff’s First Complaint. Dkt. # 107 (“Securities Order”); Dkt. # 108 (“Fiduciary Duty Order”), Dkt. # 109 (“Antitrust Order”). Those orders granted Defendants’ motions to dismiss, but gave Plaintiff limited leave to amend. Specifically, the court permitted Plaintiff to amend allegations that the directors of WatchGuard Technologies, Inc. (“WatchGuard”) breached their fiduciary duties in conduct leading to the acquisition of WatchGuard in a going-private merger in October 2006. Antitrust Ord. at 13. The court also let Plaintiff amend insider trading allegations against “Vector,” a collection of Defendants who competed for the right to acquire WatchGuard. *Id.*

In the Second Complaint, much has changed. The First Complaint alleged that WatchGuard’s Board of Directors (“the Directors”) acted more or less en masse in failing to appropriately auction off WatchGuard. Although certain allegations described fraudulent conduct by one or more Directors, most of the complaint was devoted to allegations of non-fraudulent breaches of duty. Fid. Duty Ord. at 4-5 (summarizing breach of fiduciary duty allegations). Now, Plaintiff alleges a thoroughgoing scheme to defraud WatchGuard’s board and shareholders. At the center of the new fraud allegations is Edward Borey, WatchGuard’s CEO and Chairman. Mr. Borey allegedly refused to consider any bid for WatchGuard that did not assure that he would continue as CEO of the post-merger company; he sabotaged suitors who would not offer him the interim CEO post, he lied to or withheld information from other Directors; he purged members of management who stood in the way of his scheme, and he destroyed evidence. The Second Complaint’s vague allegations make it difficult to determine what the other Directors knew, but they breached their fiduciary duties either by lying to shareholders about the acquisition process, or by turning a blind eye to Mr. Borey’s misconduct. ¶ 3¹ (“Other [D]irectors . . . turned a blind eye to the activities of Borey in conscious disregard

¹ The court cites the Second Complaint using bare “¶” symbols.

1 and abdication of their duties of loyalty and independence by ignoring the obvious
2 signals and sources of information that indicated Borey was improperly conducting the
3 sale of the Company.”). Plaintiff also contends that “FP,” a collection of corporate and
4 individual Defendants who competed for the right to purchase WatchGuard, aided and
5 abetted breaches of fiduciary duty by entering into a “secret deal” with Mr. Borey to
6 provide him personal benefit in exchange for a favorable merger price. ¶¶ 2, 97. These
7 allegations form the basis of Plaintiff’s breach of fiduciary duty claim against the
8 Directors and FP.

9 Plaintiff also contends that Vector traded on inside information in purchases of
10 about 1.57 million shares of WatchGuard stock from March 14, 2006 to March 22, 2006.
11 ¶¶ 53-54, 88. According to the Second Complaint, Vector acquired those shares while in
12 possession of “confidential and proprietary information” about WatchGuard, and did so
13 in violation of “customary non-disclosure and standstill agreements” it had entered with
14 WatchGuard. ¶ 53.

15 The court reserves a detailed discussion of Plaintiff’s allegations for its later
16 analysis. The Directors and FP have moved to dismiss the breach of fiduciary duty
17 claims against them. Vector has moved to dismiss the insider trading claims. The court
18 now turns to each set of motions.

19 III. ANALYSIS

20 The court discussed the standards applicable to a motion to dismiss in its prior
21 orders, and incorporates that discussion here. Briefly, the court must consider Plaintiff’s
22 allegations of fact and all plausible inferences arising from allegations of fact in the light
23 most favorable to Plaintiff. The court will discuss heightened pleading requirements in
24 the context of the allegations to which they apply. Generally, the court is limited to
25 considering the complaint itself, but it may also consider documents to which the
26 complaint refers so long as no one questions the authenticity of the document. *Marder v.*
27

1 *Lopez*, 450 F.3d 445, 448 (9th Cir. 2006). The court may also consider evidence subject
2 to judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

3 Defendants have filed an omnibus Request for Judicial Notice (“RJN,” Dkt.
4 # 123). The court relies on documents included therein only in two circumstances. First,
5 where Plaintiff’s complaint relies on assertions about a specific written agreement, the
6 court relies on the version of that agreement disclosed in SEC filings included in the RJN.
7 Second, the court takes judicial notice of certain SEC filings. In doing so, the court does
8 not accept the truth of any statement contained in the filings, but rather relies on them as
9 uncontroverted evidence that the statements were disclosed to the public. The court has
10 not relied on any documents in the RJN except those it cites in this order. The court
11 notes that although Plaintiff objects to the RJN, it does not dispute the authenticity of any
12 document.

13 **A. Plaintiff’s New Breach of Fiduciary Duty Allegations Do Not Comply with**
14 **Fed. R. Civ. P. 9(b), and Thus Fail to State a Claim.**

15 **1. The Court Considered and Dismissed the Breach of Fiduciary**
16 **Allegations in the First Complaint.**

17 In the First Complaint, Plaintiff attributed WatchGuard’s allegedly low merger
18 price to the Board’s failure to take steps during the acquisition process to maximize the
19 value of the company. *Fid. Duty Ord.* at 4-5. With a few exceptions, these allegations
20 did not amount to fraud or even bad faith, but rather to a less-than-zealous or even
21 incompetent exercise of fiduciary responsibility to maximize the value of the company.
22 *Id.* In addition, Plaintiff alleged conflicts of interests arising from benefits accruing to the
23 Directors in the merger. *Id.* Only a few allegations sounded in fraud, such as allegations
24 that the Directors intentionally withheld information about Vector’s initial acquisition
25 offer to help win shareholder ratification of a “poison pill,” and that the Directors
26 ultimately accepted the FP bid to hide unspecified “non-public information” that would
27 have made them liable. *Id.* at 6 & n.3.

1 The court dismissed Plaintiff's original breach of fiduciary duty claims for two
2 reasons. First, it held that the 8 Del. C. § 102(b)(7) liability-limiting clause in
3 WatchGuard's articles of incorporation shielded the Directors from liability for any
4 breach of their fiduciary duty of care. *Id.* at 10-11. Claims based on the Directors'
5 negligence, even gross negligence, come under this shield. *Id.* Second, the court held
6 that shareholder ratification of the WatchGuard merger was an independent defense to a
7 breach of a duty of care, and a defense to Plaintiff's allegations that the Directors had
8 breached their duties of loyalty and good faith. *Id.* at 11-16. The court held that Plaintiff
9 could overcome shareholder ratification only by showing that WatchGuard's proxy
10 disclosures contained material omissions or misrepresentations, or were coercive. *Id.*
11 Absent one of those showings, Plaintiff could overcome ratification only by alleging that
12 the merger was a waste of corporate assets. *Id.* at 16-17. The court held that there were
13 no allegations giving rise to a plausible inference of material omissions or
14 misrepresentations, a plausible inference of coercion, or a plausible inference of waste.
15 *Id.* at 16-18. Finally, because there were no allegations that the Directors' conduct
16 prevented consideration of competing bids to acquire WatchGuard, the court held that
17 ratification obviated an application of enhanced "Revlon" judicial scrutiny of the
18 Directors' conduct. *Id.* at 18-19.

19 If Plaintiff has sufficiently pleaded its new allegations in the Second Complaint,
20 then the court would likely reach a different result than in the Fiduciary Duty Order.
21 Since that order, Plaintiff has radically transformed its complaint, changing the focus
22 from garden-variety breach of fiduciary responsibility allegations to new allegations of
23 fraud pervading the acquisition process. Accepting the new allegations, the Directors
24 would still bear no liability for negligent or grossly negligent conduct by virtue of the 8
25 Del. C. § 102(b)(7) liability-limiting clause. Ratification, however, would no longer
26 serve as a defense, because the new allegations describe many fraudulent, material
27 omissions or misrepresentations from the proxy statement. In essence, the Second

1 Complaint alleges that Mr. Borey hid material information about acquisition bids from
2 shareholders, and did so while the other Directors either actively aided his fraud or
3 impermissibly turned a blind eye toward it. In addition, the Second Complaint alleges
4 that Mr. Borey's fraudulent behavior prevented WatchGuard from considering
5 acquisition offers, which would give rise to enhanced "Revlon" scrutiny of the
6 acquisition process.

7 **2. The Second Complaint Makes Fraud the Focus of Plaintiff's Breach of**
8 **Fiduciary Duty Claims.**

9 Ultimately, the court concludes that the new allegations do not meet the
10 heightened pleading standard of Fed. R. Civ. P. 9(b). Before explaining that conclusion,
11 the court reviews the new allegations in detail.

12 **a. From the Outset of the Acquisition Process, Mr. Borey Insisted**
13 **on Being Named Interim CEO of the Post-Acquisition Company.**

14 Plaintiff's new allegations focus largely on the assertion that Mr. Borey refused to
15 consider efforts to acquire WatchGuard unless the prospective acquirer agreed to name
16 him the interim CEO of the post-acquisition company. Mr. Borey insisted from his first
17 meeting with a potential acquirer that he be employed as "interim CEO" of the post-
18 merger company. ¶ 26. This first meeting took place between Mr. Borey, WatchGuard
19 General Counsel Mike Piraino, and Vector representatives in late March 2005. ¶¶ 25-27.
20 Plaintiff alleges that the Directors' description of this meeting in the merger proxy was
21 "incomplete, inaccurate and misleading," but does not explain its allegation. ¶ 25. This
22 meeting "stalled" because Defendant Alexander Slusky, Vector's principal, refused to
23 promise Mr. Borey the interim CEO post, and insisted that he be able to present
24 acquisition offers to the other Directors. ¶ 26. There is no allegation that Vector made a
25 formal acquisition offer at this early meeting. There is also no allegation that would
26 explain how Mr. Borey prevented Vector from expressing its interest to the other
27 Directors. Nonetheless, the Second Complaint alleges that Mr. Borey "intentionally did
28 not disclose Vector's interest to the Board," his first fraudulent omission. ¶ 34. Mr.

1 Borey allegedly kept Vector's interest secret so that he could revamp his compensation to
2 increase his personal benefit in a change of control. ¶¶ 28, 34.

3 **b. Mr. Borey Revises His Compensation to Benefit Him in Any**
4 **Acquisition of WatchGuard.**

5 As of the March 2005 meeting, Mr. Borey was subject to a compensation
6 agreement that took effect when WatchGuard hired him on June 30, 2004. ¶ 27; RJN,
7 Ex. K. In relevant part, it awarded Mr. Borey one million WatchGuard stock options, of
8 which one quarter would vest one year later, and the remainder would vest in equal
9 monthly increments until all options vested four years later. RJN, Ex. K ¶ 3. In the event
10 that Mr. Borey lost his job through a qualifying corporate transaction (like a sale or
11 merger of the company), vesting would accelerate by 24 months from the date of his
12 termination. *Id.* ¶¶ 3, 9. He would also receive a lump-sum payment equal to twice his
13 annual salary. *Id.* ¶ 9.

14 According to the Second Complaint, Mr. Borey directed changes in his
15 compensation shortly after his initial meeting with Vector, believing that an acquisition
16 of WatchGuard was imminent. ¶¶ 28-32. Mr. Borey presented the changes to the other
17 Directors. ¶ 34. The Directors approved the changes and disclosed them in two April
18 2005 SEC filings. ¶ 35. Those filings disclose two compensation changes, which the
19 Second Complaint describes as an Enhanced Severance Agreement ("ESA") and "Option
20 Regrant." ¶ 35; RJN, Ex. L (describing ESA and Option Regrant), Ex. M (describing
21 Option Regrant).

22 The Option Regrant was open to all WatchGuard employees with options whose
23 exercise price was more than \$6 per share. RJN, Ex. M. At the time, WatchGuard stock
24 was trading well below \$6. ¶ 28. The Regrant gave option holders the right to exchange
25 their options for options with an exercise price at the then-current trading price, at an
26 exchange ratio determined by the exercise price of the original options. RJN, Ex. M.
27 The new options would vest under the same schedule as the original options. *Id.* Mr.

1 Borey took advantage of the Option Regrant in May 2005, exchanging one million
2 options with an exercise price of \$7.21 for 900,000 options with an exercise price of
3 \$3.45. ¶ 40.

4 The ESA replaced Mr. Borey's June 2004 compensation package. RJN, Ex. L. It
5 did not raise Mr. Borey's salary. *Id.* Instead, it eliminated the two-year accelerated
6 vesting that the previous package provided, and replaced it with complete vesting of *all*
7 stock options in the event that Mr. Borey lost his job within 18 months of a qualifying
8 corporate transaction. *Id.* It also provided him proportional payment of his annual bonus
9 target, depending on how much of the year he had worked when his termination occurred.
10 *Id.* At the same time that the Directors approved the ESA, they approved severance
11 packages for other officers in which they would receive one year's salary in the event
12 they lost their jobs within 18 months of a qualifying corporate transaction. *Id.* (attaching
13 "Change in Control Severance Agreement [For Executives Other than CEO/CFO]")
14 (bracketed material in original).

15 The ESA and Option Regrant assured that Mr. Borey stood to gain substantially
16 from an acquisition of WatchGuard.² Indeed, the Complaint alleges that Mr. Borey
17 proposed the Regrant and the ESA for his own benefit. ¶ 28, ¶ 32 ("Borey instructed
18 Piraino to have the Option Regrant drafted in a manner particularly beneficial to his
19 interests but to attempt to disguise this objective."), ¶ 34 (alleging that ESA and Regrant
20 were "intended to enrich Borey in a change of control transaction that he recognized was
21 imminent"). He would become fully vested in at least 900,000 WatchGuard options at an
22 exercise price of \$3.45. He would receive a substantial payment. Most importantly, for

23
24 ² The court notes that Plaintiff cannot challenge the ESA or Option Regrant as a breach of
25 anyone's fiduciary duty. Claims for excessive executive compensation must be brought
26 derivatively, even where they precede a change of control transaction. *Kramer v. Western Pac.*
27 *Indus., Inc.*, 546 A.2d 348, 353 (Del. 1988) (holding that claims of "payment of unnecessary
options, bonuses, fees, and expenses" before a merger can be remedied only in a derivative claim
for corporate waste). Plaintiff asserts no derivative claims, nor could it, because it lost standing
to assert derivative claims when the WatchGuard merger extinguished its shares. *Id.* at 354
(citing continuous shareholder ownership rule of *Lewis v. Anderson*, 477 A.2d 1040 (Del. 1984)).

1 purposes of this order, he would receive these benefits in *any* change of control
2 transaction. Thus, Mr. Borey had every incentive to maximize the acquisition price of
3 WatchGuard. Every penny of increase in the share price of the acquisition would benefit
4 him \$9000 from the exercise of his stock options alone, and more from his other stock
5 holdings. *See* Fid. Duty Ord. at 8 (noting that Directors collectively owned 5.8% of
6 WatchGuard stock before accounting for stock options). The other Directors were also
7 substantial stockholders, and similarly stood to benefit from any increase in the
8 acquisition price. *Id.*

9 These guaranteed change-of-control benefits make Mr. Borey’s alleged insistence
10 on being employed as “interim CEO” a curious proposition, to say the least. Plaintiff
11 never describes what benefits would accrue to Mr. Borey as a result of being employed as
12 the interim CEO. This omission is significant, because the Second Complaint alleges that
13 Mr. Borey’s obsession with the “interim CEO” post caused him to depress the acquisition
14 price of WatchGuard by a minimum of 85 cents per share, at a personal cost to him of
15 more than \$750,000. Plaintiff’s description of Mr. Borey’s costly sabotage of the bidding
16 process follows.

17 **c. Mr. Borey Sabotages the Acquisition Process by Thwarting**
18 **Suitors Who Would Not Agree to Name Him Interim CEO.**

19 Plaintiff contends that at about the same time that WatchGuard approved the ESA
20 and Option Regrant, Mr. Borey continued to refuse to let Vector speak to the other
21 Directors without agreeing to appoint him “interim CEO.” ¶ 36. Concerned that Vector
22 would attempt a hostile takeover of WatchGuard, Mr. Borey prepared a “poison pill”
23 shareholder rights plan to protect against that contingency. ¶¶ 37-38; Fid. Duty Ord. at 2
24 (describing poison pill), 7-8 (concluding that adopting poison pill was not a breach of
25 fiduciary duty). The poison pill would take effect only after a third party acquired more
26 than 15% of WatchGuard’s stock on the open market. First Request for Judicial Notice
27 (Dkt. # 72), Ex. D. WatchGuard disclosed the adoption of the poison pill and its terms in

1 a May 2005 SEC filing. *Id.*; ¶ 39. The Second Complaint does not disclose how Mr.
2 Borey was able to simultaneously hide Vector’s interest in acquiring WatchGuard from
3 the other Directors while convincing them to adopt a poison pill that was of value only in
4 the event of an unapproved attempt to acquire the company.

5 The Second Complaint alleges that WatchGuard’s SEC filing disclosing the
6 adoption of the poison pill falsely stated that “WatchGuard is not currently aware of any
7 attempts to acquire control of the company.” ¶ 39. This statement would appear to be
8 true, as there is no allegation that Vector had attempted to acquire WatchGuard at that
9 time, as opposed to merely expressing interest in an acquisition. If the Directors’ public
10 statement was false, the Second Complaint does not explain why it was false.

11 After the adoption of the poison pill, WatchGuard began to search for prospective
12 acquirers or partners. This led Mr. Borey to speak with numerous companies and private
13 equity funds. ¶ 42 (describing at least 15 suitors). According to the Second Complaint,
14 Mr. Borey insisted to each interested party that he be retained as interim CEO. *Id.* No
15 one except FP expressed an interest in acceding to Mr. Borey’s demand. ¶ 43. Mr.
16 Borey “hermetically sealed” his meetings with the suitors, and falsely reported his
17 discussions at those meetings to the other Directors. ¶ 44 (alleging that Mr. Borey either
18 “sterilized the information presented to the Directors or did not report the content of
19 meetings”). The Second Complaint fails to allege what Borey said or did to ensure that
20 the other Directors remained in the dark, other than an allegation that Mr. Borey fired at
21 least four WatchGuard officers, including its Chief Financial Officer, because they had
22 “too much knowledge and/or object[ed] to Borey’s practices.” ¶ 47 n.4. According to
23 the Second Complaint, all suitors except FP and Vector were “driven off” by Mr. Borey’s
24 sabotage. ¶ 43.

25 The other Directors refused to take a more active role in the acquisition process,
26 allowing Mr. Borey to conduct all negotiations. ¶¶ 45-46. When Mr. Borey met with
27 investment banks in September 2005 for assistance in the search for an acquirer or

1 partner, the other Directors took no role. ¶ 47. The Second Complaint is either vague or
2 silent as to whether the other Directors' inaction was because Mr. Borey lied about or
3 withheld information that would have caused them to act, because the Directors were
4 complicit with Mr. Borey because they knew (or should have known) of his misconduct.
5 The Second Complaint also fails to address the other Directors' WatchGuard stock
6 holdings, which would have provided them with substantial incentive to maximize the
7 acquisition price of the company.

8 By February 2006, Vector circumvented Mr. Borey and sent a letter directly to the
9 full board. ¶ 49. The Second Complaint does not explain why Vector could not have
10 done so sooner. In a February 17 letter, Vector expressed its interest in an all-cash
11 merger or tender offer, expressed concern that it was not being included in a rumored
12 search for acquirers, and demanded a meeting with the board. *Id.* Despite the Second
13 Complaint's allegation that Mr. Borey had prevented Vector from making a bid
14 beginning in March 2005, Vector's letter does not contain even a hint that it had
15 previously attempted to make an offer for WatchGuard. ¶ 49 (quoting letter); RJN, Ex. H
16 (disclosure of letter in SEC filing). Mr. Borey and Mr. Piraino allegedly intercepted the
17 letter at a WatchGuard fax machine and hid it from the other Directors. ¶ 51. They also
18 declined to disclose the offer to WatchGuard's shareholders, believing it would cause the
19 shareholders to vote against the poison pill. ¶ 56. Instead, Mr. Borey met with Vector in
20 the week of March 13, 2006. ¶ 52: RJN, Ex. H. Vector also met with Mr. Borey and
21 "several of WatchGuard's executive vice presidents" a week after Vector sent the letter.
22 *Id.* Whatever efforts Mr. Borey made to keep Vector's letter from the other Directors, it
23 became a matter of public record when Vector included it as an exhibit to an SEC filing
24 on March 23, 2006. ¶ 55. According to the Second Complaint, this only strengthened
25 Mr. Borey's opposition to any transaction with Vector. ¶ 58.

26 FP and Vector submitted competing bids within days of each other in late May
27 2006. FP's offer came first, a conditional bid of \$5.00 per share. ¶ 65. Vector's offer

1 had no financing contingencies, was for \$5.10 per share, and was conditioned only on
2 completing due diligence. ¶ 66; RJN, Ex. I (May 31 SEC filing from Vector disclosing
3 \$5.10 bid). Mr. Borey nonetheless insisted that he would not support the Vector offer
4 unless it included assurance that he would be the interim CEO. ¶ 67. The Second
5 Complaint strangely alleges that the Directors breached their duties by not “publicizing”
6 Vector’s \$5.10 bid to create a “floor” for bidding. ¶ 68. Vector publicized the bid in an
7 SEC filing within days of making it (RJN, Ex. I), raising the question of what additional
8 publicity Plaintiff would have required from the Directors.

9 **d. Mr. Borey Enters a Secret Agreement with FP to Support Its**
10 **Lower Offers To Acquire WatchGuard in Exchange for the**
Interim CEO Post.

11 Although the Vector offer was for more money, Mr. Borey reached an agreement
12 with FP to support its bid in exchange for naming him as interim CEO. ¶ 70. Because it
13 had “purchased the support of Borey,” FP lowered its bid to \$4.60 per share. ¶ 71. Mr.
14 Borey did not disclose his agreement with FP to the Directors or WatchGuard
15 shareholders. ¶ 73. Thus, when the other Directors contacted Vector and FP to attempt
16 to negotiate a bid in excess of \$5 per share, it was a “valueless” exercise. ¶ 73, ¶ 74
17 (alleging that Mr. Borey told FP that it did not need to increase its bid unless Vector did
18 so, because he “controlled the Directors”).

19 In late June 2006, Vector responded to FP’s bid by submitting a \$4.65 per share
20 bid, ¶ 72, and publicly disclosing it in a June 28 SEC filing. RJN, Ex. J. The bid was
21 again contingent on additional due diligence. *Id.*

22 FP responded on July 18 with a \$4.25 per share bid that would expire in three
23 days. ¶ 75. Vector continued to express its interest in acquiring WatchGuard, and was
24 informed that the FP transaction was imminent. ¶ 76. Mr. Borey secretly directed his
25 representatives to provide Vector with a draft merger agreement that provided that he
26 would be retained as interim CEO. *Id.* The Second Complaint does not reveal whether
27 Vector agreed to this provision, but it did state its intent to submit a bid at a “substantial

premium” to WatchGuard’s market price. ¶ 77. Committing fraud again, the Directors falsely stated in the merger proxy that Vector’s final effort had come after they had voted in favor of the FP transaction, when in actuality it had come before the vote. ¶ 77.

WatchGuard announced the acceptance of FP’s bid on July 25, 2006. ¶ 78. Although the merger agreement contained a “fiduciary out” clause that permitted the Directors to exercise their fiduciary duty to consider a superior competing bid, there is no allegation that anyone made a superior bid. There are also no allegations that Mr. Borey continued his campaign to sabotage competing bids.

Shareholders ultimately approved the WatchGuard merger, which closed in early October 2006. Shareholders never knew about Mr. Borey’s secret agreement with FP to be retained as interim CEO, because the proxy did not disclose it. ¶ 81. The merger proxy disclosed that Mr. Borey would be retained as interim CEO of the post-merger company³, despite the Second Complaint’s mistaken allegations to the contrary. ¶ 81.

Punctuating the fraudulent scheme, Mr. Piraino “destroy[ed] key documents concerning Borey and Piraino’s secret deal with FP, as well as other documents concerning the process leading up to the Acquisition.” ¶ 86. The Second Complaint alleges, albeit with no additional detail, that Mr. Borey was complicit in the destruction of the documents. ¶ 3. The Second Complaint contains no allegations about the content of the documents. The court notes, moreover, that Mr. Piraino is not a defendant.

3. Plaintiff’s Allegations of Fraud Do Not Comply With Rule 9(b).

Most of Plaintiff’s new allegations are averments of fraud. Most of them target Mr. Borey: he intentionally failed to disclose his first meetings with Vector to the other

³ The Second Complaint alleges falsity in this statement in the merger proxy: “The directors and officers of Warrior immediately prior to the merger will become the directors and officers of the surviving corporation following the merger.” ¶ 81 (quoting RJN, Ex. A at 59). This statement is allegedly false because it does not disclose that Mr. Borey would become CEO of the post-merger company. Plaintiff is simply mistaken. The proxy disclosed that the Directors of WatchGuard would resign at the time of the merger to be replaced by directors of FP’s merger subsidiary, Warrior. RJN, Ex. A at A-3. The *officers* of WatchGuard, by contrast, would remain as officers of the merger subsidiary. *Id.* Thus, the proxy discloses that the post-merger company would have FP-appointed directors and WatchGuard’s officers, including Mr. Borey as CEO.

1 Directors so that he could pursue personal benefits; he either misrepresented to the other
2 Directors the contents of his meetings with suitors or simply refused to tell them about
3 the meetings; he intercepted Vector's February 17 letter to the Board, disclosing it neither
4 to other Directors nor shareholders; and he did not disclose that his support of FP's bids
5 had been "purchased" with a secret agreement to retain him as interim CEO. Some
6 allegations target false representations by the Directors as a whole: they lied in the
7 merger proxy about Vector's first expression of interest in acquiring WatchGuard; they
8 lied in announcing the poison pill by stating that they were not aware of current attempts
9 to acquire the company; they failed to disclose in the merger proxy the material benefits
10 that Mr. Borey was receiving from FP; and they lied when they stated that Vector's final
11 offer had come after they had voted on the FP bid, rather than before the vote. The
12 allegation that Mr. Piraino and Mr. Borey destroyed unspecified "key" documents is an
13 allegation of a fraudulent cover-up. Any of these allegations describe fraud under
14 Delaware law, Washington law, or federal securities laws.

15 Even though Plaintiff has not pleaded a cause of action for fraud, or any cause of
16 action of which fraud is an element, averments of fraud are subject to Rule 9(b). *Vess v.*
17 *Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1005 (9th Cir. 2003). Rule 9(b) serves at least
18 two functions. First, it ensures that allegations of fraud are particularized enough to give
19 a defendant notice of specific misconduct, so that he can defend himself with more than a
20 blanket denial of wrongdoing. *Id.* at 1106. Second, it shields both defendants and courts
21 from plaintiffs who might use unsubstantiated allegations of fraud as a "pretext for the
22 discovery of unknown wrongs." *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985);
23 *see also Anderson v. Clow (In re Stac Secs. Litig.)*, 89 F.3d 1399, 1405 (9th Cir. 1996)
24 (citing *Semegen*); *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001) (citing
25 *Stac*). In part, Rule 9(b) helps weed out false or unsubstantiated allegations of fraud, with
26 their attendant damage to the defendant's reputation, from legitimate accusations. *Bly-*
27 *Magee*, 236 F.3d at 1018. It also helps stop a plaintiff from "unilaterally imposing upon

1 the court, the parties and society enormous social and economic costs absent some factual
2 basis.” *Semegen*, 780 F.2d at 731. In a case like this one, where discovery is frozen
3 pending the outcome of a motion to dismiss, allowing fraud allegations that do not satisfy
4 Rule 9(b) would “promote settlement based on the anticipated litigation expense,” rather
5 than the merits of the claim. *See McHenry v. Renne*, 84 F.3d 1172, 1178 (9th Cir. 1996).

6 Plaintiff’s fraud allegations do not satisfy Rule 9(b). To do so, they would have to
7 “state with particularity the circumstances constituting fraud,” except for the defendant’s
8 mental state. Fed. R. Civ. P. 9(b). A plaintiff must buttress fraud allegations with “the
9 who, what, when, where, and how” of the fraud. *Vess*, 317 F.3d at 1106 (citation
10 omitted); *see also Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993) (“The
11 complaint must specify such facts as the times, dates, places, benefits received, and other
12 details of the alleged fraudulent activity.”). Where specificity depends on information
13 uniquely in the hands of a defendant, a plaintiff may satisfy Rule 9(b) with allegations
14 based on “information and belief,” but must “state the factual basis for the belief.”
15 *Neubronner*, 6 F.3d at 672.

16 Despite Rule 9(b)’s requirements, Plaintiff’s fraud allegations raise more questions
17 than they answer. Who committed fraud? Mr. Borey is an obvious culprit, but where the
18 other Directors are involved, it is rarely clear whether they are alleged to have known that
19 they were deceiving shareholders. For example, the complaint targets many false
20 statements in the merger proxy, but does not explain whether Directors other than Mr.
21 Borey were aware that the statements were false when made.

22 What benefits did Mr. Borey or the other Directors hope to derive from the fraud?
23 If Mr. Borey did what Plaintiffs allege, he cost himself at least \$765,000, the difference
24 between the value of his 900,000 stock options at Vector’s initial \$5.10 bid and the \$4.25
25 bid from FP that WatchGuard ultimately accepted. He would not do so unless the
26 “interim CEO” post he desired was worth at least that much. Yet the Second Complaint
27 is wholly silent as to the benefits Mr. Borey was to receive as “interim CEO” or any

1 information about that post, including how long he would occupy it.⁴ What about the
2 interim CEO post made it valuable enough that Mr. Borey give up at least \$765,000?
3 Similarly, to the extent that the other Directors' conduct is alleged to be fraudulent, why
4 would they participate in a fraud that cost them hundreds of thousands of dollars?

5 To the extent that the interim CEO post merely perpetuated Mr. Borey's existing
6 compensation package, those benefits were publicly disclosed, as was the fact that Mr.
7 Borey would be the interim CEO of the post-merger company. *See supra* n.3. Thus,
8 unless the interim CEO post came with material benefits that the proxy did not disclose,
9 shareholders ratified Mr. Borey's retention as interim CEO after full disclosure. The
10 Second Complaint is silent as to any benefit accruing to Mr. Borey as interim CEO. For
11 that reason, allegations of breach of the duty of loyalty based solely on Mr. Borey's
12 retention as CEO are extinguished by ratification.

13 For the same reasons, allegations of fraud against FP based on its agreement to
14 "purchase" Mr. Borey's acquiescence in sharply decreased bids are deficient as well.
15 Absent some allegation that FP offered Mr. Borey a reward that would make him forego
16 at least \$765,000 for his WatchGuard stock, the allegations of fraud against FP lack
17 particularity.

18 How did Mr. Borey perpetrate the fraud? In particular, how was he able to keep
19 sophisticated suitors with hundreds of millions of dollars for a potential acquisition of
20 WatchGuard from communicating with other Directors? If Mr. Borey insisted on
21 remaining entrenched as CEO, why did those entities not make direct contact with other
22 Directors? Why did they not use corporate media to publicize Mr. Borey's self-dealing?
23 They were capable of doing so, as the Second Complaint describes several instances in
24 which would-be acquirers publicized their concerns about the WatchGuard acquisition

25 ⁴ Defendants requested that the court take judicial notice of Mr. Borey's termination agreement,
26 which he, WatchGuard, and WatchGuard's post-merger parent company executed on October 4,
27 2006, just before the merger closed. RJN, Ex. O. That contract is not a proper subject of judicial
28 notice, and Defendants' contention that the Second Complaint relies on the agreement is
erroneous. ¶ 81 (describing interim CEO agreement existing as of September 1, 2006).

1 process. *E.g.*, ¶¶ 49, 61. After the Directors voted to approve a merger, how did Mr.
2 Borey continue to prevent interested suitors from making topping bids in the more than
3 two months between the vote and the closing of the merger?⁵ Although Mr. Borey
4 intercepted Vector’s February 17, 2006 letter to the Board, the other Directors clearly
5 became aware of it at some point. When?

6 Why are some of the statements that the Directors made false? Plaintiff alleges
7 that the merger proxy’s description of Vector’s first contact with WatchGuard was
8 “incomplete, inaccurate, and misleading.” ¶ 26. Plaintiff does not explain this allegation,
9 and the court has no basis to conclude that it was materially inaccurate. Similarly, the
10 Directors’ statement that they were unaware of any attempt to acquire WatchGuard when
11 they approved the poison pill appears, based on all allegations in the complaint, to be
12 true, but Plaintiff alleges without corroborating detail that it is “deceptive, false, and
13 misleading.” ¶ 39. Plaintiff alleges that the Directors falsely stated in the merger proxy
14 that Vector sent an e-mail about a revised bid after the Board had voted to approve the FP
15 bid. ¶ 77. Vector alleges that this is false because Vector had received an “overture”
16 before the vote. *Id.* Yet the proxy discloses that the afternoon before the Directors’
17 evening vote, Vector had not yet submitted a “definitive proposal.” RJN, Ex. A at 30. If
18 that statement is false, *i.e.* if Vector made a “definitive proposal” before the Director’s
19 vote, Plaintiff must describe the definitive proposal with particularity.

20 What was the content of the fraudulent misrepresentations and omissions?
21 Plaintiff’s allegations that Mr. Borey “sanitized” his communications with the other

22
23 ⁵ In the Fiduciary Duty Order, the court described various deal protection devices in the merger
24 agreement, including a “no-shop” provision, an agreement that the Directors would vote their
25 shares in favor of the merger, and a \$6 million termination fee. *Fid. Duty Ord.* at 18-19. The
26 court also noted, however, that the poison pill expired in early 2006, and the merger agreement
27 contained a “fiduciary out” clause that permitted the Directors to exercise their fiduciary duties
28 to consider superior bids. *Id.* The only barrier that the protection devices erected was an implicit
requirement that a rival bidder top FP’s bid by 17 cents per share to overcome the termination
fee. *Id.* at 19. Vector made two bids that exceeded FP’s \$4.25 bid by 40 cents and 85 cents,
respectively. The deal protection devices did not prevent Vector from making those bids after
the Directors approved the merger.

1 Directors about the acquisition process do not permit anyone to understand what he
2 revealed, what he omitted, or what he lied about. What “key” documents did Mr. Piraino
3 destroy, and what did Mr. Borey tell him to destroy?

4 Plaintiff’s allegations suffer rather than benefit from reliance on information
5 acquired from two “confidential witnesses.” The confidential witnesses (“CWs”) were
6 WatchGuard vice-presidents who allegedly observed many of the events giving rise to the
7 new allegations. ¶ 26 n.1 (describing CW1 as “intimately involved in the acquisition
8 process”), ¶ 42 n.2 (“CW2’s involvement in the acquisition process consisted of
9 presenting information about WatchGuard to potential suitors”). Despite their intimate
10 involvement with the acquisition process, the CWs offer little detail. CW1 witnessed Mr.
11 Piraino’s destruction of “key documents concerning Borey and Piraino’s secret deal with
12 FP, as well as other documents concerning the process leading up to the Acquisition.”
13 ¶ 86. But CW1 provides no information at all about the content of the documents, and no
14 allegations detailing Mr. Borey’s involvement in their destruction. CW1 allegedly had
15 sufficient inside access to know that Vector made a bid just before the Directors’ vote, ¶
16 77, but he offers no information about that bid. CW1 witnessed Mr. Borey in meetings
17 where he insisted to suitors that he be retained as interim CEO, ¶ 42, but offers no details
18 about what Mr. Borey said. Plaintiff is not obligated to rely on confidential witnesses
19 when making allegations of fraud, but in doing so, it weakens its ability to claim that
20 information about that fraud is uniquely in the hands of Defendants. *See Neubronner*, 6
21 F.3d at 672 (describing “relaxed version” of Rule 9(b) that applies to information
22 exclusively within defendant’s control). Plaintiff’s reliance on insider witnesses merely
23 highlights its failure to plead fraud with particularity.

24 **4. Stripped of Insufficiently Particular Allegations of Fraud, the Second**
25 **Complaint Does Not State a Breach of Fiduciary Duty Claim.**

26 Plaintiff’s failure to plead allegations of fraud with particularity is also fatal to its
27 allegations of non-fraudulent misconduct. Not all of Plaintiff’s new allegations describe

1 fraud, and the court has already noted that the First Complaint was mostly based on
2 allegations of non-fraudulent conduct. *Fid. Duty Ord.* at 6 n.3. When considering the
3 Second Complaint, the court must disregard all allegations of fraudulent conduct and
4 strip them from the complaint. *Vess*, 317 F.3d at 1105. Stripped of allegations of
5 fraudulent conduct, the Second Complaint consists of three categories of allegations:
6 allegations of breach of fiduciary duty that the court already rejected in dismissing the
7 First Complaint, allegations that Mr. Borey attempted to secure personal benefits in
8 negotiation acquisitions (and that FP aided and abetted the attempt), and allegations that
9 the other Directors abdicated their fiduciary duties. The latter two categories, however,
10 consist of allegations that are either non-actionable or nonsensical without accompanying
11 allegations of fraud. When allegations of Mr. Borey's fraudulent agreement with FP are
12 stripped from the Second Complaint, his entrenchment in the interim CEO post was
13 disclosed to the shareholders in the merger proxy and thus ratified by their vote to
14 approve the merger. FP's decision to offer him the post is similarly ratified. When
15 allegations of Mr. Borey's fraudulent misrepresentations and omissions to the other
16 Directors are stripped from the Complaint, the other Directors have done no more than
17 they were alleged to have done in the First Complaint. The court already rejected those
18 allegations as the basis of a breach of fiduciary duty claim.

19 For these reasons, the court dismisses the Second Complaint's breach of fiduciary
20 duty claims. This dismissal makes it unnecessary for the court to address Plaintiff's
21 claims that Vector and FP⁶ are liable as WatchGuard's successor companies.

24 ⁶ Among the changes in the Second Complaint was an assertion that Vector and FP are
25 successors to WatchGuard, at least in part because they agreed to indemnify the Directors. Even
26 assuming that Vector and FP were somehow successors to WatchGuard, WatchGuard itself is not
27 a Defendant in this action. Moreover, Plaintiff cites no authority for the proposition that an
28 agreement to indemnify the Directors somehow converts FP and Vector into co-Defendants. The
court declines to address these issues in further detail only because its disposition today does not
require it to do so.

1 **B. Plaintiff's Insider Trading Allegations Fail to Establish Standing or Raise a**
2 **Strong Inference of Scienter.**

3 Plaintiff alleges that Vector purchased at least 1.57 million shares of WatchGuard
4 while in possession of confidential information, in violation of Section 10(b) of the
5 Exchange Act (15 U.S.C. § 78j(b)), Rule 10b-5 (17 C.F.R. § 240.10b-5). According to
6 Plaintiff, Vector purchased those shares from March 14, 2006 to March 22, 2006, while
7 in possession of material non-public information. ¶¶ 54, 88.

8 When the court dismissed the First Complaint's insider trading allegations against
9 Vector, it noted that the allegations were subject both to the heightened pleading
10 requirements of Fed. R. Civ. P. 9(b) and the Private Securities Litigation Reform Act
11 ("PSLRA"). Securities Ord. at 6. Plaintiff's allegations were deficient for three reasons.
12 First, Plaintiff's contradictory allegations left much doubt as to whether the First
13 Complaint alleged that Vector had material non-public information when it bought the
14 shares. *Id.* at 6-7. Second, the allegations admitted that Vector had not entered an
15 agreement with WatchGuard not to disclose or trade on the information until after Vector
16 bought the shares. *Id.* at 7-8. That admission was fatal, because Plaintiff relied on the
17 "misappropriation theory" of insider trading, which requires a non-insider defendant to
18 trade on non-public information in violation of a legal duty to the source of that
19 information. *Id.* at 5 (describing "classical" and "misappropriation" theories of insider
20 trading). Vector's obligation to WatchGuard arose, if at all, from an agreement
21 prohibiting the use of information it acquired during due diligence. Absent allegations
22 that Vector entered such an agreement *before* making the challenged trades, it could not
23 be liable. Third, the court found that the First Complaint fell short of satisfying the
24 PSLRA's requirement that its allegations give rise to a strong inference that Vector acted
25 with scienter. *Id.* at 8.

26 Plaintiff cured the first two problems in its Second Complaint. It alleged that
27 Vector acquired material non-public information from WatchGuard just prior to March

1 14, 2006 in the course of due diligence before making an acquisition offer. ¶ 53. Vector
2 also executed “customary nondisclosure and standstill agreements” before receiving the
3 information on or about March 13, 2006. *Id.* Plaintiff’s new allegations, however, do
4 nothing to cure its failure to state allegations giving rise to a strong inference of scienter.
5 Moreover, they reveal another problem: Plaintiff lacks standing to sue for insider
6 trading.

7 Before addressing scienter and standing, the court notes that describing Plaintiff’s
8 insider trading allegations is no easy task. In its September 23, 2008 order to show cause,
9 the court detailed the “confounding pleading” style that characterized the allegations of
10 insider trading in the First Complaint. Dkt. # 138 at 5. Despite plain warning from the
11 court and Defendants, Plaintiff repeated the same “logically and factually [in]consistent”
12 allegations in the Second Complaint. *Id.* at 8. The court issued its order to show cause in
13 part because the allegations gave rise to an inference that “Plaintiff has deliberately used
14 obfuscatory pleadings for the purpose of making it difficult to attack those pleadings in a
15 motion to dismiss.” *Id.* at 9. In response to the order to show cause, Plaintiff clarified its
16 insider trading allegations. The court relies on Plaintiff’s response to the order to show
17 cause, as well as clarifying statements in Plaintiff’s opposition to Vector’s motion to
18 dismiss, to assess the insider trading allegations. For purposes of addressing standing, the
19 critical admission in these pleadings is that Vector *bought* 1.57 million shares of
20 WatchGuard while in possession of material non-public information, and that only
21 persons who *sold* shares contemporaneously with Vector have standing to sue.

22 Courts require a private plaintiff seeking damages for insider trading to have
23 traded contemporaneously with the defendant. *Brody v. Transitional Hosps. Corp.*, 280
24 F.3d 997, 1001 (9th Cir. 2002) (“The contemporaneous trading requirement . . . is a[]
25 judicially-created standing requirement, specifying that to bring an insider trading claim,
26 the plaintiff must have traded in a company’s stock at about the same time as the alleged
27

insider.”).⁷ Moreover, a plaintiff must plead contemporaneous trading in a manner that satisfies Rule 9(b)’s particularity requirement. *Neubronner*, 6 F.3d at 670.

Plaintiff has no standing to sue for insider trading. Not only does it fail to allege contemporaneous trading with particularity, it fails to allege that it traded at all. The only allegation pertaining to Plaintiff’s stock ownership is that it held 10,000 WatchGuard shares at the time of the merger. ¶ 11. Rather than alleging that it traded contemporaneously with Vector, Plaintiff alleges that other WatchGuard shareholders traded contemporaneously with Vector. ¶ 88. Plaintiff’s desire to represent those shareholders in a class or subclass is of no consequence. As of now, there is no class or subclass, and thus no allegation that any party to this litigation traded contemporaneously with Vector. Plaintiff’s contention that the court should not address its lack of standing until the class certification stage is unsupported by any legal authority.⁸

The court notes, moreover, that while the contemporaneous trading requirement is a question of statutory standing, a plaintiff that does not trade at all likely lacks standing under either constitutional or prudential standing principles. Courts often struggle with the question of how close in time a trade must be to an insider’s trade to be contemporaneous. *E.g.*, *Neubronner*, 6 F.3d at 670 (noting lack of clear “borderline” in contemporaneous trading rule). But where the plaintiff alleges no trades at all, deeper questions of standing arise. How does one claim an “injury in fact” that satisfies Article III of the Constitution when one does not claim to have suffered an injury at all? *See*

⁷ The contemporaneous trading requirement applies not only to Plaintiff’s Section 10(b) and Rule 10b-5 claims, but also to its derivative claim under Section 20A of the Exchange Act (15 U.S.C. § 78t-1(a)). *In re Verifone Secs. Litig.*, 784 F. Supp. 1471, 1488 (N.D. Cal. 1992), *aff’d*, 11 F.3d 865 (9th Cir. 1993).

⁸ Plaintiff cites *Hevesi v. Citigroup, Inc.*, 366 F.3d 70, 82 (2d Cir. 2004). There, the court merely noted that a “lead plaintiff” in an action subject to the PSLRA need not have standing to pursue every claim of every class member. *Id.* Unlike Plaintiff, the lead plaintiff in *Hevesi* had co-plaintiffs with standing to pursue those claims. *Id.* (noting “named plaintiffs who have standing to bring the additional claims” even though they had not been “vetted under the PSLRA”). Plaintiff similarly mis-cites *In re Lantronix*, No. CV02-3899PA(JTLX), 2003 WL 23198818 (C.D. Cal. Dec. 31, 2003). There, the lead plaintiff sought to add a co-plaintiff with standing to bring all claims. *Id.* at *11-12. There is no co-plaintiff with standing in this action.

1 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (discussing injury requirement
2 for Article III standing). Similarly, prudential standing rules require plaintiffs to “assert
3 their own rights rather than rely on the rights or interests of third parties.” *Hong Kong*
4 *Supermarket v. Kizer*, 830 F.2d 1078, 1081 (9th Cir. 1987). Where Plaintiff pleads no
5 injury to itself, the court questions whether it has subject matter jurisdiction to address
6 the insider trading claim. *See, e.g., Ar v. Hawaii*, 314 F.3d 1091, 1097 (9th Cir. 2002)
7 (noting that Article III standing is the cornerstone of a federal court’s subject matter
8 jurisdiction).

9 Although Plaintiff has not pleaded statutory standing, and may lack constitutional
10 or prudential standing, the court will also address its failure to plead scienter. The court
11 does so because Plaintiff suggests it can cure any standing defects merely by amending
12 its complaint to add a plaintiff with standing. Dkt. # 126 at 19-20.

13 Plaintiff’s allegations do not create a strong inference of scienter on Vector’s part,
14 as the PSLRA requires. First, the Second Complaint fails to allege what information
15 Vector acquired before purchasing 1.57 million shares from March 14 to March 22, other
16 than to generically allege that it was material and non-public. Absent such detail, there is
17 little reason to infer that Vector acted with either intent to deceive or deliberate
18 recklessness akin to intentional deception when it traded. *See Metzler Investment GMBH*
19 *v. Corinthian Colleges, Inc.*, 540 F.3d 1049, 1066 (9th Cir. 2008) (defining scienter).
20 Second, the Second Complaint fails to address that if Vector had entered a standstill
21 agreement on March 13 in which it promised not to purchase additional WatchGuard
22 shares after learning information in due diligence, its decision to immediately purchase
23 1.57 million shares in violation of that promise is curious at best. Even before it
24 purchased those shares, Vector owned more than 1.6 million WatchGuard shares. Pltf.’s
25 Opp’n (Dkt. # 126) at 11 n.5 (relying on Vector’s “March 23 2006 Schedule D”); ¶ 55
26 (describing Mar. 26, 2006 13-D filing). It knew that a purchase of 1.57 million additional
27 shares would require it to disclose those purchases to the public in an SEC filing. Indeed,

1 it made its mandatory SEC disclosure on March 26. This gives rise to a strong inference
2 that Vector did not know that it was purchasing the additional shares in violation of an
3 agreement with WatchGuard. The competing inference, that Vector knew that it had
4 agreed not to purchase more shares, then unlawfully purchased 1.57 million of them and
5 immediately disclosed its unlawful conduct to the SEC and the public, is weaker, to say
6 the least. An inference of scienter sufficient to satisfy the PSLRA must be “more than
7 merely plausible or reasonable – it must be cogent and at least as compelling as any
8 opposing inference of nonfraudulent intent.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*,
9 127 S.Ct. 2499, 2404-05 (2007).


10 For the reasons stated above, the court finds that Plaintiff lacks standing to sue
11 Vector for insider trading, and that even if it did not, the Second Complaint does not
12 satisfy the PSLRA requirement that it give rise to a strong inference of scienter. This
13 dispenses with Plaintiff’s primary claims for insider trading. The court dismisses
14 Plaintiff’s derivative claims under Sections 20(a) and 20A of the Exchange Act (15
15 U.S.C. § 78t(a), 15 U.S.C. § 78t-1) because of the lack of a predicate violation. *See*
16 *Securities Ord.* at 14 (citing *Johnson v. Alijan*, 490 F.3d 778, 781 n.11 (9th Cir. 2007),
17 and *Paracor Fin., Inc. v. GE Capital Corp.*, 96 F.3d 1151, 1161 (9th Cir. 1996)).

18 IV. CONCLUSION

19 For the reasons stated above, the court grants Defendants’ motions to dismiss
20 (Dkt. ## 119, 121, 122) and dismisses the Second Complaint. The court dismisses the
21 complaint with prejudice and without leave to amend. The court’s review of Plaintiff’s
22 oppositions to the instant motions shows that it has not requested leave to amend other
23 than to add a plaintiff with standing to sue for insider trading. Even if it had, the court
24 has broad discretion to refuse leave to amend, particularly where it has already given a
25 plaintiff an opportunity to remedy a defective complaint. *Metzler*, 540 F.3d at 1072. In
26 this case, Plaintiff gives the court no reason to believe that it could state a viable claim if
27 it were permitted to amend its complaint again.

The clerk shall not enter judgment at this time. The court will enter judgment after it resolves the issues described in its September 23, 2008 order to show cause.

DATED this 30th day of March, 2009.


The Honorable Richard A. Jones
United States District Judge